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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

MARY MUSAELIAN,

Plaintiff,

v.

WILLIAM L. ADAMS, et al.

Defendants and Respondents;

JOHN G. WARNER

Real Party in Interest and Appellant.

A116412

(Sonoma County Super.
Ct. No. SCV236208)

John G. Warner appeals an order appropriating a cash deposit in lieu of an appeal bond. We reverse.

I. BACKGROUND

We are familiar with the background of this dispute through our review of a prior appeal in this action (*Musaelian v. Adams* (July 25, 2007, A112906) [nonpub. opn.] (*Musaelian I*)) and an appeal in an underlying action (*Reiter v. Musaelian* (June 30, 2006, A110100 [nonpub. opn.] (*Reiter*)).¹ This case presents a limited issue for our consideration, and we need not recite the extensive history of the litigation among the parties. Warner, the appellant here, represented Musaelian during most of the proceedings in this case below.

¹ The “Musaelian” in *Reiter* was Mary Musaelian’s husband, Andrew Musaelian. References to “Musaelian” herein are to Mary Musaelian. References to “the Musaelians” are to Mary and Andrew Musaelian, collectively.

In this action, Musaelian alleged various tort causes of action against defendants William Adams and Joseph Reiter.² Adams and Reiter demurred, and the trial court sustained the demurrer without leave to amend. In addition, Adams moved for sanctions against Musaelian and Warner on the ground that the complaint was not warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law, that it was devoid of evidentiary support, and that it was brought to delay and increase the cost of litigation. Reiter joined in Adams's motion and separately moved for sanctions against Warner. The trial court granted the sanctions motions under Code of Civil Procedure³ section 128.7, subdivision (b)(1) and (2), concluding that the action brought by Musaelian and filed by Warner was frivolous and utterly without merit. On Adams's motion for sanctions, the court on January 20, 2006, found Musaelian and Warner jointly and severally liable for sanctions of \$25,050.00. On Reiter's motion, Warner was held liable for sanctions of \$46,845.00.

Musaelian and Warner appealed from the award of sanctions. Shortly afterwards, they submitted a pleading entitled "Deposit in Lieu of Bond," which stated in pertinent part: "Plaintiff Mary Musaelian and her attorney John G. Warner herewith deposit the sum of \$37,575.00 in lieu of bond, pursuant to Code of Civ. Pro. § 995.710(a)(1). [¶] . . . [¶] The sole beneficiary of this deposit is defendant William L. Adams. [¶] The court is authorized to apply this deposit to enforce the liability of either principal to defendant William L. Adams in connection with their appeal of this court's Statement of Decision dated January 20, 2006"

Musaelian reached a settlement of her disputes with Adams and Reiter. As pertinent here, the settlement agreement required the Musaelians to dismiss with prejudice all appeals in state court, as well as a proceeding in bankruptcy court. It also provided that Adams, Reiter, his attorney, and the Musaelians, along with another law

² These claims arose in large part from *Reiter*, in which Andrew Musaelian was the defendant. The facts in the underlying action are not germane to the appeal before us now.

³ All undesignated statutory references are to the Code of Civil Procedure.

firm, released each other from all claims, *with the exception of Reiter's and Adams's claims for sanctions and attorney fees under existing and future sanction and attorney fee orders*. However, under the agreement, “the Sanction Claim is non-recourse and Reiter and Adams *may only look to existing appellate bonds to satisfy such Sanction Claim* and may not look to the assets of any of the Parties.” (Italics added.) Reiter and Adams agreed to pay the Musaelians “the first \$22,500 recovered on account of the appellate bonds. Thereafter all recoveries on the bonds are the assets of Reiter and Adams.”

Warner was not a party to the settlement agreement.

On April 4, 2006, Musaelian asked this court to dismiss her appeal of the sanction order. The appeal was dismissed as to Musaelian on May 22, 2006, and a partial remittitur, addressing only Musaelian's appeal, was issued.

Adams filed a “Motion for Liability on Cash Deposit in Lieu of Appeal Bond” on August 7, 2006. He sought the full amount of the \$37,575 cash deposit, to cover Musaelian's obligation to pay \$25,050 in sanctions to Adams, plus interest, as well as attorney fees to be awarded. In opposition to the motion, Warner submitted his own declaration attesting that he had paid the \$37,575 in lieu of an appeal bond out of his own funds, that none of the cash deposit money was paid by Musaelian, that he had never given Musaelian permission to use the cash deposit to fund any settlement with Adams or any other party to the proceedings, and that the purpose of the cash deposit was to obtain a stay of enforcement of the January 20, 2006, sanction order. Musaelian joined in Warner's opposition, and submitted a declaration stating that she had paid none of the cash deposit money, that Warner had not given her permission to use the money to fund a settlement with Adams or any other parties, and that she had dismissed her appeal of the sanction order voluntarily in accordance with the settlement agreement.

The trial court entered an “Order for Appropriation of Cash Deposit in Lieu of Appeal Bond” on January 5, 2007, ordering the clerk to disburse to Adams \$30,797 from the deposit. Warner appealed from the order, which is the subject of the appeal now before us.

Meanwhile, in *Musaelian I*, Warner continued to pursue his appeal of the sanction order. On July 25, 2007, this court reversed the sanction award as to Warner on two grounds. First, we concluded that, as an attorney who represented himself in propria persona below, Adams was not entitled to attorney fees as a sanction because he had not “incurred” any fees for purposes of section 128.7. (*Musaelian I, supra*, at pp. 9-10, 15.) Second, we concluded that the action was not frivolous for purposes of section 128.7 and that the sanction award must be reversed in its entirety. (*Musaelian I*, at pp. 21, 23.) The California Supreme Court granted review in *Musaelian I*, and issued an opinion affirming our judgment. (*Musaelian v. Adams* (2009) 45 Cal.4th 512 (*Musaelian II*).)⁴

II. DISCUSSION

A. Use of Deposit to Satisfy Judgment Against Musaelian

Warner contends the trial court erred in allowing the cash deposit in lieu of bond to be used to satisfy Musaelian’s obligations under the settlement agreement. To decide whether the deposit could be used for this purpose, we look to its language and to the statutory scheme governing such deposits on appeal.

1. Statutory Background

Section 917.1, subdivision (a)(1) provides that unless an undertaking is given, an appeal does not stay enforcement of a judgment or order of the trial court requiring payment of money. Subdivision (b) states: “The undertaking shall be on condition that if the judgment or order or any part of it is affirmed or the appeal is withdrawn or dismissed, the party ordered to pay shall pay the amount of the judgment or order, or the part of it as to which the judgment or order is affirmed, as entered after the receipt of the remittitur, and costs which may be awarded against the appellant on appeal. . . . The liability on the undertaking may be enforced if the party ordered to pay does not make the payment within 30 days after the filing of the remittitur from the reviewing court.” The

⁴ The high court limited the issues on review to the following question: “Was [Adams], an attorney representing himself in a civil action, entitled to an award of attorney fees as a sanction against the plaintiff under Code of Civil Procedure section 128.7 for engaging in frivolous litigation?” (*Musaelian II, supra*, Supreme Ct. order, Apr. 11, 2007, S156045 [2007 Cal. Lexis 12445].)

purpose of an appeal bond is “to protect the judgment won in the trial court from becoming uncollectible while the judgment is subjected to appellate review. It provides the successful litigant with ‘an assured source of funds to meet the amount of the money judgment, costs and postjudgment interest after postponing enjoyment of a trial court victory.’ ” (*Lewin v. Anselmo* (1997) 56 Cal.App.4th 694, 700 (*Lewin*), quoting *Grant v. Superior Court* (1990) 225 Cal.App.3d 929, 934.)

In lieu of a bond, section 995.710 authorizes a litigant to deposit money or other items with the court. The deposit must be “accompanied by an agreement executed by the principal authorizing the officer to collect, sell, or otherwise apply the deposit to enforce the liability of the principal on the deposit.” (§ 995.710, subd. (c).) Such a deposit “has the same force and effect, is treated the same, and is subject to the same conditions, liability, and statutory provisions, including provisions for increase and decrease of amount, as the bond.” (§ 995.730; see *Cooper v. Westbrook Torrey Hills* (2000) 81 Cal.App.4th 1294, 1298.) If the deposit is given to stay enforcement of a judgment on appeal, the principal is required to pay “the amount of the liability on the deposit . . . within 30 days after the filing of the remittitur from the appellate court in the court from which the appeal is taken.” (§ 995.750, subd. (b).) If the principal fails to do so, “the deposit shall be collected, sold, or otherwise applied to the liability upon order of the court that entered the judgment of liability, made upon five days’ notice to the parties.” (§ 995.760, subd. (a).)

2. Appropriation of Deposit

Warner contends the cash deposit should not have been appropriated to cover Musaelian’s obligations to Adams after she settled her disputes with him. It is settled that “ ‘a surety cannot be held beyond [the] express terms of his contract.’ ” (*ITT Diversified Credit Corp. v. Highlands Ins. Co.* (1987) 191 Cal.App.3d 301, 308 (*ITT Diversified*), quoting *Southern Cal. First Nat. Bank v. Olsen* (1974) 41 Cal.App.3d 234, 241.) As stated in *Gerrior v. Superior Court* (1924) 69 Cal.App. 186, 192, “[L]ike all other obligations, an appeal bond is subject to be so construed as to carry out the obvious intention of the parties. [Citations.] Of course, the rule as thus stated must be understood

with the qualification that the courts will not extend the liability of sureties beyond the clear import of their contract.” Thus, in order to determine the extent of Warner’s liability on Musaelian’s behalf, we must “examine both the undertaking and the underlying agreement the performance of which appellant has, as surety, guaranteed.” (*ITT Diversified, supra*, 191 Cal.App.3d at p. 308; see also *U.S. Leasing Corp. v. DuPont* (1968) 69 Cal.2d 275, 284-285 [making independent determination of obligations under guaranty based on meaning of terms thereof and uncontradicted extrinsic evidence].)⁵

The “Deposit in Lieu of Bond” states that “Mary Musaelian and her attorney John G. Warner herewith deposit the sum of \$37,575.000 in lieu of bond,” pursuant to section 995.710, subdivision (a)(1). It further states that the principals protected by the deposit were Musaelian and Warner, that Adams was the beneficiary of the deposit, and that “[t]he court is authorized to apply this deposit to enforce the liability of either principal to defendant Williams L. Adams *in connection with their appeal* [of the sanction order].” (Italics added.) Both Warner and Musaelian submitted declarations stating that Warner paid the entire cash deposit, that he did not participate in the mediation conference that led to the settlement agreement, and that he did not give Musaelian permission to use it to fund a settlement with Adams or anyone else.

Warner contends Adams is not entitled to the funds he deposited with the trial court because the sanction order was not affirmed on appeal as to either him or Musaelian—that is, that he prevailed on appeal, and Musaelian’s dismissal of her appeal pursuant to the settlement agreement did not operate as an affirmance of the order against her.

On the facts of this case, we agree that the deposit should not have been appropriated to satisfy Musaelian’s obligations to Adams. The “Deposit in Lieu of Bond” recited that the court was authorized to use the funds to enforce the liability of Warner or Musaelian *in connection with their appeal*. By its terms, the deposit does not apply to Musaelian’s liability under a *settlement*. Bearing in mind the uncontroverted

⁵ Adams does not dispute that Warner acted in the role of surety with respect to the appeal of the sanction order as against Musaelian.

evidence that Warner did not authorize Musaelian to use the deposit to fund a settlement, we conclude the trial court erred in allowing the deposit to be appropriated.

This result does not conflict with the purposes of the statutes governing bonds and deposits on appeal. Musaelian and Warner were jointly and severally liable for the sanctions award in favor of Adams. When Musaelian settled her disputes, Warner continued to appeal the sanction order. The funds remained available to protect Adams in the event the order was affirmed on appeal. (See *Lewin, supra*, 56 Cal.App.4th at p. 700.) To allow Warner's appeal deposit to be used to pay to Adams the very sanctions award under consideration on appeal would render the appeal virtually meaningless. Neither the terms of the deposit, nor the understanding between Musaelian and Warner, nor the language of the statutes, compels this anomalous result.

3. Judicial Estoppel and Ethical Duty

Adams also contends Warner is barred from challenging the bond appropriation order by the doctrine of judicial estoppel and by his ethical duties to his clients. These contentions are based on events that occurred after the trial court made the order at issue here, and we will not consider them. (See *In re Francisco W.* (2006) 139 Cal.App.4th 695, 706 [matters occurring after entry of judgment ordinarily not reviewable].)⁶

III. DISPOSITION

The order appealed from is reversed.

RIVERA, J.

We concur:

REARDON, Acting P.J.

SEPULVEDA, J.

⁶ We deny Adams's request for judicial notice of pleadings and documents filed in this and related cases after entry of the appropriation order.